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Political Authority and Unjust Wars

How should we conceive the relationship between the moral principles which govern justified resort to war (*jus ad bellum* principles) and those which place constraints on how wars should be fought (*jus in bello* principles)? According to traditional just war theory, as long as combatants fight within the constraints of *jus in bello* (most notably, by refraining from using certain weapons or tactics), they are permitted to kill enemy combatants independently of whether their war satisfies *jus ad bellum* principles, including the principle of having a just cause.¹ This is because the right to kill enemy combatants is traditionally conceived as an extension of the right to personal self-defence: just as you are permitted to use necessary and proportionate force to defend yourselves against those who pose a threat of lethal harm to you, soldiers are permitted to use necessary and proportionate force to defend themselves against those who pose a threat of lethal harm to them.

This view, known as the doctrine of the “moral equality of combatants,” has been recently rejected by an increasing number of philosophers, most notably Jeff McMahan (2009), Cécile Fabre (2012), David Rodin (2002) and Helen Frowe (2014).² While buttressed by a number of sophisticated arguments, the move made by these philosophers is ultimately simple, and consists in questioning the assumption that we are permitted to use necessary and proportionate force to defend ourselves against whoever poses a threat of lethal harm to us. For surely we are not permitted to do so if our target has done

¹ The traditional view is articulated in the classic work of Michael Walzer (2006) and implemented in international law.

² For a helpful overview of the debate, see Lazar 2016.

nothing to lose her right not to be attacked, whereas we have. If I wrongfully attack you and you can defend yourself only by killing me in self-defence, you are permitted to do so. But suppose now that the only way for me to defend myself from your defensive attack is to kill you. Would it be plausible to say that you and I are “morally equal”? After all, with my wrongful attack I did something to lose my right not to be killed, whereas you did nothing to lose yours. But if you retain your right against being killed and I don’t, we should conclude that while you are permitted to kill me, I’m not permitted to kill you.

The same holds for combatants, “revisionists” such as McMahan, Fabre, Rodin and Frowe argue. Since the moral principles that regulate the use of force in war are the same that regulate the use of force in ordinary life,³ we should reject the doctrine of the moral equality of combatants for the simple reason that while combatants fighting for an unjust cause lose their right not to be killed, combatants fighting for a just cause don’t. Thus, the latter are permitted to attack the former (within the constraints of *jus in bello*),⁴ but not vice versa.⁵

This means that combatants are to be held responsible not only for their conduct during the war (i.e. for complying with *jus in bello* principles), but also for their choice to fight a certain war in the first place (i.e. for complying with *jus ad bellum* principles).⁶

³ This view is sometimes called “reductivism” (Frowe 2014, 2). Reductivism is one of the main tenets of revisionism.

⁴ Henceforth this qualification will be taken for granted in the paper.

⁵ As others have noticed (McMahan 2009, 33–34; Ryan 2011, 14–18), this view is not new, but draws on what was considered the orthodox view between the thirteenth and the seventeenth century.

⁶ ~~Indeed, according to revisionists like McMahan, it is conceptually impossible to comply with *jus in bello* principles unless *jus ad bellum* principles are also met. This is because the main function of *jus in bello* principles is to specify when inflicting certain harm counts as necessary and proportionate for the purposes~~

Contra the traditional view, they are not permitted to take part in any war they are ordered to fight. Rather, they must take responsibility for their actions and do what they can to establish whether the war in question is just. When they lack reasons to believe that it is just, their duty is to disobey the order to fight (McMahan 2009, 144; [Fabre 2012, 77–78](#)).

Of course, lacking sufficient reasons to believe that the war is just is not tantamount to having sufficient reasons to believe that the war is unjust. Despite their best efforts, combatants might lack sufficient reason to believe either claim. In this case, according to [some prominent](#) revisionists, combatants should presume that their duty is *not* to fight. This is because in fighting, combatants risk contributing to the killing of innocents,⁷ and their duty not to contribute to the intentional killing of the innocent is *ceteris paribus* stronger than their duty to contribute to achieving whatever aim is pursued by the war, including the aim of preventing innocents from being killed (since killing is normally considered worse than letting die). ~~For these reasons, revisionists argue, we should conclude~~ Thus, as McMahan puts it, “in conditions of uncertainty, the moral presumption is against fighting” (McMahan 2009, 144; [see also Fabre 2009, 59](#)).

I believe that both the traditional and the revisionist view capture important aspects of how we should think about the morality of war. The claim that the justice of the cause matters to determine whether combatants are permitted to fight can be hardly

~~of achieving some good; but in the case of combatants fighting on the unjust side, there simply is no good being pursued by them whose achievement can justify the infliction of any amount of harm. Thus, only combatants fighting for a just cause are in a position to comply with *jus in bello* principles.~~

⁷ Following McMahan (2009, 10–15), I use the term “innocents” to refer to those who have done nothing to make themselves morally liable to military attack. Thus, by innocents I do not simply mean non-combatants, but also combatants fighting on the just side.

resisted, and this explains the success of the revisionist approach (to the point that this approach can now be said to be the new orthodoxy among philosophers).⁸ However, revisionists fail to pay sufficient attention to an important aspect of the problem, namely that combatants typically do not act as private agents engaging in ordinary self-defence, but as members of a political body; and that *qua* members of a political body, special duties apply to them. Unless we subscribe to philosophical anarchism (the view that there is no duty to obey the law as such – (Wolff 1998; Simmons 1979),⁹ the claim that these duties can affect the permissibility of taking part in war seems intuitively plausible, and deserves closer scrutiny than it has received so far.¹⁰ After all, loyalty and political obedience are precisely the notions invoked by Walzer to support the traditional view that combatants should obey the order to fight, rather than investigating the justice of the cause pursued by their state (Walzer 2006, 39–40) Thus, those who intend to reject his approach will have to take seriously these notions.

Taking seriously the importance of the duty to obey the law however, does not commit us to endorsing Walzer's view. The problem with the latter (besides the fact that he does not clearly distinguish between the duty to obey the law and considerations of loyalty to one's country), is that it overstates the force of the duty to obey and completely disregards the importance of the just cause. While Walzer is certainly right in acknowledging the importance of the fact that combatants normally operate within a structure of political responsibilities, this is not enough to conclude, as he does, that their

⁸ See for example, McPherson 2004; Coady 2007; Bazargan 2014. Recent (qualified) defenses of the traditional view can be found in Kutz 2005; Kutz 2016; Benbaji 2011; Lazar 2013; Lazar 2015a.

⁹ As far as I know, none of the main proponents of the revisionist approach has explicitly endorsed philosophical anarchism.

¹⁰ McMahan does address this problem. I will consider some of his arguments below.

will is never engaged in deciding whether to fight, but only in deciding how to fight. Saying that Rommel should not be considered a “wilful wrongdoer, but a loyal and obedient subject and citizen,” (Walzer 2006, 39) and that his obedience to Hitler is enough to make it permissible for him to fight, is implausible for the reasons that revisionists have so powerfully articulated in their work.

Thus, a plausible account of the morality of war will have to strike a middle path between these two views: it will have to acknowledge the relevance of the just cause in establishing whether combatants can permissibly fight, while also paying attention to the normative implications of the fact that combatants typically act as members of political bodies. These are the two desiderata to be met in order to overcome the problems that afflict the traditional and the revisionist view respectively. Providing such an account is the aim of this paper.

I will argue that when members of a legitimate state are ordered to fight, they are placed under a pro-tanto obligation to obey.¹¹ This obligation does not depend for its validity on the justice of the cause being pursued. However, when the war is unjust, this obligation can be overridden (under certain conditions) by a weightier obligation, namely the obligation not to contribute to the unjustified killing of innocents. Moreover, I will argue that combatants are under a duty to do what they can to find out whether the war they are ordered to fight is unjust. As it will become clear, this view captures the insights of both the traditional and the revisionist view, while at the same time avoiding the problems that afflict each of them. The view goes some way towards rescuing the doctrine of the moral equality of combatants, while retaining the main insight of

¹¹ “Pro-tanto obligations” are to be contrasted with “all-things-considered” obligations. They are genuine obligations, which become decisive unless they are overridden by stronger countervailing considerations.

revisionism about the importance of *jus as bellum* considerations for the permissibility to fight.

I proceed in six steps. I start by considering a recent attempt to resist the revisionist challenge by looking at the duties that combatants have *qua* members of political communities (section 2). I call this “the political argument for the duty to fight”. Since my aim is to defend a version of this argument, it will be helpful to consider the shortcomings of this earlier attempt. I then introduce my own version of the political argument by addressing a powerful objection raised by Jeff McMahan (section 3). In answering this objection, I articulate a justification for the existence a pro-tanto duty to obey the order to fight, independently of the justice of the war at hand.¹² The nature of this duty is then further clarified in section 4, where I explain how its pro-tanto force is to be understood in terms of the existence of “presumptive reasons” to obey the law. Section 5 addresses four possible objections to the model of presumptive reasons. Section 6 concludes by outlining the relationship between my view and the revisionist as well as the orthodox view.

2) A non-teleological formulation of the duty to obey

A version of what I have called the “political argument” has recently been offered by Cheyney Ryan (2011).¹³ According to Ryan, combatants are under an obligation to obey the order to fight wars, even when unjust, because by doing so they sustain political institutions that perform important tasks, including the task of fighting wars that are

¹² In this paper I will use “duty” and “obligation” interchangeably.

¹³ David Estlund (2007) also offers a version of the political argument, but since I criticize his view at length elsewhere (*omitted*), I will not discuss it at length here.

generally just. Although Ryan calls this the “Argument to Democratic Duty”, democratic procedures do not play much of a role in it.¹⁴ His point is rather that political institutions are necessary to protect our lives, as well as important moral values. Although these institutions will sometimes go wrong, they generally wage just wars (i.e. fight for just causes justly). Thus, the reason why we have a duty to obey even when we are commanded to fight an unjust war is that this is required in order to “protect our protectors,” as Hobbes puts it, i.e. in order to support the institutions that play such a fundamental role.¹⁵

I think this argument points in the right direction, but the obvious reply to it is that even if we grant the existence of a duty to fight when required to by our state, this surely must be a pro-tanto duty – one that can be overridden, at least in some circumstances, by our duty not to contribute to the killing of innocents. Thus, while something like Ryan’s argument can ground a duty to fight an unjust war, we should certainly expect the duty to be overridden, at least some times, by the competing duty not to contribute to the killing of innocents without justification.¹⁶

This however, is a move that Ryan wants to resist. To make his point, he resorts to a parallel with the criminal justice system: “suppose that the institution of capital

¹⁴ The reason for calling this argument “democratic” seems to be simply to exclude its application to unjust political institutions, such as the Nazi regime (Ryan 2011, 22).

¹⁵ It’s worth noticing here that the “protective institutions” that Ryan is talking about are not simply military institutions, but the broader political institutions of which military institutions are simply a component (Ryan 2011, 21).

¹⁶ To be sure, all wars involve killing some innocents. Even just wars do, since avoiding casualties is impossible. But while killing innocents as collateral damage in pursuing a just cause can be justifiable all-things-considered under certain circumstances, killing innocents to pursue an unjust cause is not justifiable in the same way.

punishment, like a democracy's protective institutions, is necessary to protecting oneself and one's loved ones. Suppose that one's refusal (as executioner) to execute an innocent person would jeopardize the entire institution in ways that render oneself and one's loved ones vulnerable to unjust attack. Suppose for example that you know that if you fail to execute the innocent person, you and your loved ones will be set upon by a band of criminal marauders, who are no longer deterred by the threat of capital punishment. At the very least, there is a real dilemma here" (Ryan 2011, 30–31). The suggestion is that disobeying the order to fight an unjust war would have similar catastrophic consequences.

I find this argument implausible.¹⁷ Notice, to begin with, that even if it was plausible, revisionists could reply that only when these catastrophic consequences are likely to be realized, combatants should obey the order to fight an unjust war. Whenever they have reason to believe that no similar consequences would follow, combatants could permissibly disobey. Indeed, they would have a duty to do so. The only way for Ryan to resist this reply is to argue that each and every case of disobedience is likely to produce these catastrophic consequences, but surely this cannot be right. It is never the case that isolated cases of disobedience jeopardize the existence of the state. Indeed, as many have noticed, even generalized disobedience does not compromise the state's existence or its capacity to perform its tasks (Simmons 1979; Green 1988).

The problem here is that Ryan operates within what we might call a "teleological understanding" of the duty to obey the law – one that grounds such a duty in the fact that

¹⁷ Incidentally, it's curious to see what many consider as the best known *reductio* of consequentialism (namely, the idea that sometimes punishing the innocent would produce the best consequences) here used as an argument against revisionism.

disobedience is likely to undermine the ability of political institutions to provide those benefits that justify their existence. Interestingly, he is not alone. Prominent revisionists, including McMahan, also think about the duty to obey the law in these terms (McMahan 2009, 71–75). However, this is not how we should think about it. Although the justification for political authority and political obligation ultimately does depend on the fact that states provide us with fundamentally important benefits, our duty to obey the law does not hinge on the question of whether disobedience would compromise the state's capacity to provide these benefits, but rather on the fact that when the state commands us to act in certain ways it creates for us a pro-tanto duty to act as commanded.

To see this point, consider promissory obligations. While it is plausible to suggest that the justification for the duty to keep promises ultimately relies on the fact that we benefit from the existence of a practice that enables us to create special bonds with other people, this is not to say that our duty to keep individual promises is conditional on the fact that doing so is required not to threaten the existence of this practice. Our duty to keep individual promises rather depends on the fact that when we promise to ϕ we thereby create new special moral reasons for us to ϕ , reasons that we did not have before promising. If you fail to keep your next promise, the existence of the practice of promising is not endangered in any way (this risk would only exist if a significant number of people failed to keep their promises), and yet it seems uncontroversial that you do have a pro-tanto duty to keep your promise.¹⁸ That duty might be overridden, but cannot be ignored.

¹⁸ Which is why you have a pro-tanto duty to keep your promise even if nobody would know if you didn't.

The duty to obey the law of legitimate states is to be conceived along the same lines. As long as states have legitimate authority, even a relatively high level of disobedience does not compromise their capacity to perform their crucial functions. And yet, when a legitimate state orders us to ϕ , it places us under a pro-tanto duty to ϕ . This is how political authority is normally conceived in the philosophical debate. Of course, this is not to yet say that we are right in conceiving it in this way. What we need to do now is explain *why* states have legitimate authority and what it means to say that the duty to obey the law of legitimate states is pro-tanto. This is the task to which I turn in the next section in order to develop my own version of the political argument for the duty to fight.

3) The “moral alchemy” objection

I think that Ryan is right both in grounding the duty to fight unjust wars in our duty to obey the law of legitimate states and in grounding the duty to obey the law in the fact that states provide us with vitally important benefits, most notably security and the rule of law. His mistake however, is in his characterization of the nature of the duty to obey the law. This duty, like all the duties imposed by the state, is only pro-tanto, which means that it will have to be balanced with other duties we have. Thus, when a legitimate state commands its citizens to fight, they do acquire a moral duty to do so. But when the war is unjust, this duty will be overridden, at least under certain conditions, by their duty not to contribute to the unjustified killing of innocents.

To see this point, consider again the case of promises. What happens when I break my promise to meet you for lunch in order to assist someone injured? The standard analysis of this case is that while the duty to keep my promise is overridden by a

weightier duty, it still maintains its original force. And yet we have seen that by failing to keep my promise I don't jeopardize in any way the institution of promising. The capacity of this institution to perform its valuable functions is in no way compromised by the fact that our duty to keep our promises is sometimes overridden by competing duties.

Are the duties imposed by the law special in this sense? They don't seem to be. While I am driving the injured person to the hospital I can permissibly disrespect the speed limit or the traffic light to increase the chances of saving her.¹⁹ These are cases that no one finds mysterious. So, why should there be a special problem when the same argument is applied to the duty to obey the order to fight? The answer is that there shouldn't. The two cases should be treated in the same way. Just like I have a pro-tanto duty to respect the traffic light, but this duty can be overridden when I have stronger duty to ignore it (as it is the case when ignoring the traffic light would improve the chances of saving someone's life), I have a pro-tanto duty to obey the order to fight, but this duty can be overridden when I have stronger duty not to fight (as it is the case when fighting would likely lead me to contribute the unjustified killing of innocents).

This view provides a straightforward and suitably modest formulation of the political argument for the duty to fight, as opposed to the formulations offered by Walzer and Ryan, but is subject to the following powerful objection: how could the fact that a state commands me to fight an unjust war give me *any* reason to fight? Fighting an unjust war typically involves killing innocents, and killing innocents is wrong. How could the

¹⁹ To be sure, many legislations will include a legal defense of necessity to which we can avail ourselves in these cases, but our moral permission to disrespect the speed limit is not conditional on such defense being available. The obligation to obey the law may be overridden by competing moral obligations that are not incorporated in the law.

fact that the state requires us to commit something wrong give us any reason, even pro-tanto, to do so? Following McMahan, we might argue that this view “presupposes a form of moral alchemy that is difficult to accept. How can certain people’s establishment of political relations *among themselves* confer on them a right to harm or kill *others*, when the harming or killing would be impermissible in the absence of the relevant relations?” (McMahan 2009, 82). Indeed, taking seriously the importance of *jus ad bellum* considerations seems to commit us to the conclusion that if the war we are required to fight is unjust, not only do we lack the right to fight enemy combatants, but we might have a duty to help them fighting against our own fellow citizens, since the latter are posing an unjust threat to the former (Fabre 2012, 80–81).

To address this objection, we need to pay attention to the fact that the political relations that McMahan refers to are necessary in order for individuals to live together peacefully and to respect each other’s rights. For the justification of political authority, as we have seen already, is grounded in certain important moral tasks that legitimate states perform. By performing their legislative, executive and judicial functions, legitimate states provide the level of order and coordination that is required for a minimally secure life; but states can perform these crucial moral tasks only if they have the moral power to impose genuine moral obligations on their subjects. Indeed, this is not so much a condition of their ability to perform the tasks above, but it is *how* they perform them. Some of the main problems that states are supposed to solve are coordination problems and problems relating to giving a clear content to rights and duties that would be otherwise indeterminate. The way in which states do this is by altering the balance of reasons that apply to their subjects by imposing moral obligations on them.

As it is sometimes put, the commands of the state provide their subjects with binding content-independent reasons for action. These reasons are *content-independent* because their force does not depend on the merit of what is commanded. (We have reasons to act as commanded independently of the content of what is commanded.) They are *binding* to the extent that they have a special normative force whereby they are not merely added to our other reasons for actions, but rather constrain our practical deliberation by preempting, at least to some extent, the inclusion of certain reasons within it.

I defend this view elsewhere,²⁰ but the details are not important here. In order to answer the “moral alchemy” objection we need only to grasp its rationale, which can be summarized as follows: states have authority over us because they enable us to discharge some of our most important duties of justice.²¹ One of our most important duties is the duty not to expose those living next to us to the dangers typical of the state of nature – dangers that are principally created by coordination and assurance problems, lack of enforcement, and indeterminacy of the content of rights. We can discharge this duty only if we are subject to the authority of the state, i.e. only if we take the commands of the state as providing us with binding content-independent reasons for action. This is why when the state orders us to ϕ we thereby acquire a moral obligation (i.e. new binding content-independent moral reasons) to ϕ .

²⁰ (*Omitted*)

²¹ This approach to the problem of political obligation is defended, among others, by Rawls 1999; Buchanan 2002; Wellman 2005; Stilz 2009, although each of these authors articulates it in a different way. The differences between these views can be bracketed for the purposes of this paper. Below, I keep referring to my favourite formulation of the natural duty account of political obligation, but the same argument, if successful, goes through on any of its formulations.

But as we know, states unfortunately are not perfect. All states will make mistakes and require us to sometimes act unjustly. The crucial point, however, is that legitimate states will make mistakes (or at least, serious mistakes) “in good faith” – i.e. they will try to pass, and normally succeed in passing, laws that enable their citizens to act as they should (or at least as they are morally permitted to). You might think that there is a long list of profoundly unjust states that work as counterexamples to this characterization, but notice that I have been talking of *legitimate* states. And a necessary condition that states need to meet to be legitimate is that of being reasonably just. States that are not reasonably just cannot enjoy legitimacy precisely because the point of legitimate political authority is to enable individuals to discharge some of their most important duties of justice.

A detailed discussion of the conditions of “reasonable justice” required for a state to count as legitimate is beyond the remit of this paper, but the standard generally accepted in the literature is that the state in question should neither violate, nor allow the violation of, the basic human rights of its members (Shue 2003; Buchanan 2007, 247–49). To this, we should add that the state also refrains from intentionally violating the basic human rights of non-members. This is because, while there is a tendency to believe that the legitimacy of a state depends exclusively on its relationship with its own citizens (i.e. on its performing the valuable functions identified above to the benefit of its citizens), I believe that how states behave toward other subjects in the world also affects their legitimacy. For example, a colonial regime responsible for human rights violations abroad would lack legitimacy over its own citizens, even if were to successfully protect their human rights (Fabre 2012, 47).

It is commonly accepted that only legitimate states have the power to impose moral obligations on their subjects. However, it is also commonly accepted that unjust commands of a legitimate state do bind, i.e. they do create a pro-tanto obligation for us to obey, in the same way in which just commands do. This is because states can only perform their delicate coordinative functions if they can provide their subjects with content-independent reasons for actions, i.e. reasons whose binding force does not depend on their content. As Joseph Raz puts it, “there is no point in having authorities unless their determinations are binding even if mistaken, [since] the whole point and purpose of authorities...is to pre-empt individual judgment” (Raz 1986, 47–48, 61).²²

To be sure, legitimate states do not have the power to impose on their citizens an obligation to do *anything* they like, for there are things that clearly fall outside the scope of their authority. For example, they do not have the power to decide which religion we should practice or whom we should marry. But within the scope of their authority, states are allowed to make mistakes without thereby losing their capacity to impose pro-tanto obligations.

To better see this point, consider a different sort of authority, namely the authority that doctors have over the nurses in their ward. By virtue of this authority, doctors do place nurses under a pro-tanto moral obligation to act as they require, but this is not to say that doctors can direct nurses to do anything they want. For example, a doctor cannot place a nurse under a pro-tanto moral obligation to sing for her, as this would clearly fall

²² Below I argue that Raz’s formulation of the idea of “preemption” is too strong, but it is worth noticing that even someone like Raz, who grounds the justification of political authority on its capacity to track independently correct reasons for action (Raz 1986), agrees that the directives of the authority do not stop being binding whenever it makes a mistake.

outside the scope of the doctor's authority. For the same reason, she cannot place a nurse under a pro-tanto moral obligation to kill a patient for her. This also falls outside the scope of the doctor's authority. But here is a complication: a doctor who is genuinely trying to save a patient's life *can* place a nurse under a pro-tanto moral obligation to give the patient a certain pill, even if the pill then turns out to kill the patient. For it falls within the scope of the doctor's authority to place nurses under an obligation to do what doctors reasonably believe to be in the interest of their patients. And the practical reasons created for the nurse by directives that fall within the scope of the doctor's authority are binding independently of their content.

This might sound odd. Shouldn't we rather say that nurses acquire reasons to act as directed only after they have verified that what they are required to do is indeed in the interest of the patient? No, because if that was the case, nurses could not be said to be under the doctor's authority. The doctor's directives would have at most an epistemic function: instead of providing nurses with practical reasons, they would simply indicate that there is reason for nurses to believe that, say, giving a certain pill to the patient is the right course of action. But a hospital in which nurses take doctors' decisions as mere advice, rather than authoritative directives, is one in which we would not want to find ourselves. For the efficiency of a hospital largely depends on the capacity of doctors to rely on the fact that their directives will be taken as authoritative.²³

Notice that none of this is supposed to suggest that authoritative directives can never be disobeyed. We can imagine cases in which a nurse has very strong evidence that a certain pill will kill the patient, and in these cases we will want to say that the nurse's all-

²³ Of course it might be part of the job of nurses to express their doubts about the dangers of certain medical treatments.

things-considered duty is to not give it to him, at least if the nurse is sufficiently confident in his belief that the pill would be lethal to the patient.²⁴ The point here is that this duty overrides an existing pro-tanto duty that the nurse has to act as required by the doctor – a pro-tanto duty that is created by the exercise of the doctor’s legitimate authority, even when the doctor makes a mistake. This dynamic, and its application to the question of the duty to obey the order to fight, will be further explored in the next section.

4) The presumptive nature of the duty to obey

The aim of the previous section was to explain what produces the “moral alchemy” that gives legitimate states the moral power to place their subjects under a pro-tanto obligation to act in ways that would otherwise be morally impermissible, provided that these states are acting “in good faith.” I have done this in two steps. First, I have suggested that the reason why legitimate states have the moral power to impose obligations on us is that being under the authority of legitimate states is the only way in which we can discharge our natural duty not to expose others to the dangers of the state of nature. Second, I have suggested that whilst only legitimate states impose moral obligations on us, they do so even when they require us to do something unjust, provided that they are acting within the scope of their authority. For if their directives were not content-independent, states would not be able to perform the coordinative function that justifies their existence. (Since it is by producing binding, content-independent reasons for action that states can perform this function.)²⁵

²⁴ I discuss this claim at length below.

²⁵ Christopher Wellman is the only philosopher I am aware of who defends the view that there is a duty to obey the law of legitimate states, but this duty is limited to just laws (Wellman 2005, 81–84). However,

I have not provided a defence for either of these views, but this was not my aim. Rejecting philosophical anarchism is beyond the scope of this paper. My aim was rather to show how natural duty based accounts of political legitimacy, if sound, can be employed to answer the “moral alchemy” objection. The argument of this paper is premised on the assumption that states can enjoy political legitimacy, and that when they do, they have the moral power to create moral obligations for their subjects.²⁶ I argue that if we accept this widely shared assumption, we should conclude that the moral alchemy that gives political authorities the moral power to impose on us a pro-tanto obligation to fight an unjust war is the moral alchemy that gives them the moral power to impose on us a pro-tanto obligation to do anything.²⁷ Under the assumption that the state is legitimate, its command to fight an unjust war does not work any differently from any other command, such as the command to pay our taxes or to respect traffic law. But we have seen that a state is legitimate only if it is reasonably just. And surely a state is not reasonably just if it intentionally fights unjust wars, which involve killing innocents without justification. A reasonably just state will require its citizens to fight an unjust war only when it’s making an “honest mistake,” i.e. when it’s genuinely trying to pursue a

Wellman does not distinguish between the two types of unjust laws identified in the previous section, and only considers laws that are unjust because they fall outside the scope of the authority. About those, he is certainly right that they cannot create a pro-tanto duty to obey. But as we have seen, this is not to say that unjust laws enacted by a state operating within the scope of its legitimate authority also fail to create such a duty, at least when the state is acting in good faith.

²⁶ Those interested in how natural duty accounts of legitimacy can be defended should look at the texts mentioned in footnotes 19-20. On content-independence, see Raz 1986, 35–7; Hart 1982, 243–68; Green 1988, 41–62, 225–6.

²⁷ By “anything” I mean “any of the things the state may order us to do, insofar as they fall within the scope of its authority.” As we have seen, all authorities are limited in scope and cannot create obligations in relation to matters that fall outside the scope of their authority.

just cause but failing to do so (or, as I have put it before, when it's acting "in good faith").²⁸

So, either my state is legitimate or it is not. This will depend, among other things, on whether it is reasonably just. If my state is not reasonably just, and therefore is illegitimate, I have no pro-tanto duty to obey any of its laws or commands, including, of course, its command to fight an unjust war. I might have a duty to *conform* to some of them to the extent that I have independent moral reasons to act as they require, but not a duty to *obey*, i.e. to act as required *because the authority said so*.²⁹ If my state is reasonably just and the war I am required to fight is unjust, I have a pro-tanto obligation to obey, provided that my state is acting in good faith, but this obligation may be overridden, under certain conditions, by the independent moral obligation I have not to contribute to the unjustified killing of innocents.

Thus, revisionists are certainly right that when state A unjustly attacks state V, V's citizens cannot become liable to being killed simply in virtue of the special political relations existing among the members of A. However, these relationships can nonetheless create some reasons for A's citizens to fight, reasons which will then have to be weighed against the reasons they have not to fight (grounded in the rights of V's citizens not to be

²⁸ The idea of an "honest mistake standard" is introduced by Estlund. A mistake counts as "honest" in this context when it's the product of a "legitimate, though necessarily fallible, effort to inflict the harm only if it is just to do so" (Estlund 2007, 221).

²⁹ This explains why, for example, German citizens had a duty to respect traffic law or tort law under the Nazi regime. On the distinction between *obeying* the authority and *conforming* to it, see Raz 1999, 178–86; Simmons 1979, chap. 8

killed). Although the reasons created by the orders of a legitimate political authority cannot affect what rights other people have, they can weigh against those rights.³⁰

The further point I would like to make now is that we do have a duty to find out: a) whether our state is legitimate; b) whether the legitimate state to which we belong is requiring us to act unjustly. This is because while states normally do a lot of good, they can also do a lot of harm. Illegitimate states, where their illegitimacy depends on the fact that they pursue unjust causes such as fighting unjust wars, typically do a lot of harm; and we have a duty to make sure that we are not accomplices in this harm. But legitimate states too can occasionally be responsible for causing unjustified harm, although acting with the best intentions (as it is the case when they wage an unjust war in good faith), and we also have a duty to make sure that we are not accomplices in this harm.

Of course, there are different kinds of harm that a legitimate state can perpetrate. Unnecessary taxes, forms of discrimination, and unjust trade policies are obvious examples. Even something as trivial as an unnecessary traffic light constitutes in a sense a form of unjustified harm, as it sets back our interests by constraining our liberty without good reason. This last sort of injustice however, is one that we should not care too much about, given how insignificant it is in comparison to the crucially important functions that states perform. On the other end of the spectrum is the injustice that states perpetrate when they fight unjust wars, since this involves unjustifiably killing innocents. This injustice is so serious that we have a duty to take steps to ensure that we are not accomplices in it.

³⁰ I elaborate on this point below, pp. 35-8.

This suggests that (in line with revisionism) individuals must indeed take responsibility for their actions, but (*contra* revisionism) in doing so they should also acknowledge that to the extent that they are acting as members of a legitimate state, special reasons for action apply to them. These reasons should be factored into their deliberation. The crucial task now is to explain *how* these reasons should operate in their deliberation.

We have seen that the function of these reasons is to constrain the practical reasoning of those subject to the authority. How do they do that? When the authority requires that we ϕ , we do not merely acquire new moral reasons to ϕ , reasons that we did not have before the directive was issued. What we acquire are moral reasons to ϕ that are endowed with special normative force. According to Raz's classic analysis, the reasons that the authority gives us to ϕ are "protected," in that they are combined with special second-order reasons that require us to exclude from our deliberation some of the first-order reasons that we might have not to ϕ (Raz 1999).³¹ The reasons excluded from deliberation are those that the authority was meant to consider in issuing its directive. After all, the point of obeying the authority is to do what the authority requires "because the authority has said so," i.e. independently of the merits of what we are required to do. While we are allowed, according to Raz, to think about the reasons that the authority has considered in issuing its directive, we are not allowed to consider these reasons in

³¹ "First-order reasons" are normal reasons for action grounded in self-interest, desires or morality; "second-order reasons" are reasons that we have to act (or refrain from acting) on first-order reasons. The reason you have to eat a doughnut if you are craving one is a first-order reason. Now, suppose you promised your wife not to eat doughnuts. This is a second-order reason for you not to act on this first-order reason.

deliberating about how to act. To follow the directive is precisely to disregard these reasons in our deliberation.³²

The model of “exclusionary” (or, as Raz sometimes calls them, “pre-emptive”) reasons, however, shows its limits when we are dealing with cases like my nurse example above. Under the assumption that the doctor’s directive falls within the scope of her authority, the model of exclusionary reasons commits us to the implausible conclusion that the nurse should simply follow the directive even if she is justified in believing (and sufficiently confident in her belief) that the pill will in fact kill the patient. Within the model of exclusionary reasons there is no room for the nurse to disobey, because the nurse is not allowed to include in her deliberation any of the competing first-order reasons that the doctor should have considered before issuing the directive. Those reasons, within Raz’s model, are to be excluded from her deliberative process (Perry 1988; Regan 1988; Schauer 1991a, 88–93; Gur 2007). This suggests that we should reject the model of exclusionary reasons and look for alternatives.³³

I contend that a more convincing model is one that characterizes the special binding force of the second-order reasons provided by the authority as *presumptive*,

³² Here I adopt David Owens’ formulation of Raz’s view, which is slightly different from Raz’s (Owens 2008, 413–14). Raz claims that we are permitted to *deliberate* about excluded first-order reasons, as long as we don’t *act* on those reasons. As Owens notices however, this is only because Raz takes deliberation to simply involve thinking about those reasons, as opposed to thinking about them *with the aim of settling what to do*. This latter possibility is precisely what Raz’s “exclusionary reasons” rule out (by precluding competing first-order reason to be balanced against them). I’ll stick with Owens’ formulation as I find it clearer, but nothing substantive hangs on this choice. My arguments can be easily reformulated in Raz’s terms.

³³ Defenders of the exclusionary reasons model might be tempted to reply that their model can be rescued by stipulating that clearly mistaken directives are not binding. For a discussion of the reasons why this reply will not work, see Gur 2007.

rather than *exclusionary* in nature. Like Raz, I believe that the function of authorities is to constrain the practical reasoning of those subject to them; and like him, I believe that authorities do so by providing their subjects with “protected reasons” that combine first-order reasons to act as the authority orders (reasons that the agents subject to the authority did not have before the directive was issued) with second-order reasons that require those subject to the authority to disregard, to some extent at least, in their deliberation some of the competing reasons that they might have to act otherwise. However, within the presumptive reasons model, these competing reasons are not excluded altogether from the deliberation of the agent. Rather, the second-order reasons created by the authority merely create a presumption in favour of their exclusion. If we are justified in believing that the authority has made a mistake in ordering us to ϕ , and we are sufficiently confident in our belief, the underlying first-order reasons to not- ϕ are not excluded and can be balanced in the deliberative process. When this epistemic threshold is met, the presumption in favour of obedience has been rebutted, and the reasons against ϕ -ing can be balanced with the first-order reasons to ϕ provided by the authority (and other moral reasons to ϕ we might have).³⁴

But how do we know that the authority has made a mistake? Frederick Schauer, who discusses a similar model in relation to rules more generally, appeals to “the idea of a casual look, a glimpse, a peek, a preliminary check, pursuant to which a decision maker follows the recognized rule unless some other factor overtly intrudes on her decision

³⁴ Notice that once the epistemic threshold is met at t1, the reason to ϕ created by the authority does not figure again into our deliberation at t2. The role of the presumptive reason is exhausted at t1, whether the presumption has been rebutted or not. If it wasn't, the same reason would be counted twice in our practical deliberation.

making process. Implicit in [this view] is a phenomenology such that the decision maker is open to the possibility of the presumption being overcome, but does not actively pursue it, or can do a quick check short of a thorough inquiry” (1991b, 677). While largely correct, this way of thinking about the strength of the duty to obey authoritative directives, is incomplete.

In those areas of decision making in which we have reason to believe that: a) the authority might be biased or prone to make mistakes, and b) these mistakes would lead to the perpetrations of serious injustice, something more than a “glimpse” or a quick check is required. When these two conditions are met, we have a duty to actively scrutinize the decision of the authority, and eventually disobey, if it turns out that the authority has made a mistake and there are countervailing reasons sufficiently strong to justify disobedience. Indeed, I suggest that in these cases, the amount of scrutiny that should be devoted to assessing the justification of disobedience is directly proportional to the likelihood of mistakes being made by the authority and the seriousness of the injustice that would follow.

Thus, while the reasons created by the authority are indeed “protected,” and should not simply be balanced with the other first-order reasons that apply to us, they are less protected than the model of exclusionary reasons grants.³⁵ Raz is certainly correct in saying that “if every time a directive is mistaken ... it were open to challenge as mistaken, the advantage gained by accepting the authority as a more reliable and successful guide ... would disappear” (Raz 1986, 61). But accepting this claim does not

³⁵ Following David Enoch, we might call these reasons “quasi protected.” Although Enoch does not discuss presumptive reasons, the latter are a variety of his quasi protected reasons, i.e. “reasons not to deliberate in some ways or on some reasons” (Enoch 2014, 321)

commit us to the conclusion that we should *never* challenge the authority when its directives are mistaken, as the exclusionary model requires. It only commits us to the conclusion that we should *not* do so *every time* its directives are mistaken. The advantage gained by having the authority is not lost if we challenge its directives in a limited number of cases. The cases in which we should do that, I submit, are those in which we are justified in believing that the authority has made a mistake that will lead to serious injustice and we are sufficiently confident about this belief. In these cases, our all-things-considered duty is to disobey.³⁶ Moreover, I have suggested (*contra* Schauer) that our duty is not only to disobey when it is obvious that the authority has made a mistake. Whenever we have reason to believe that the authority might be prone to make mistakes, we have a duty to carefully investigate the correctness of the decision and disobey if complying would lead to the perpetration of serious injustice.

5) Defending the “presumptive reasons” model

In section 4, I introduced the model of presumptive reasons and argued that it provides a more convincing account of the binding force of authoritative directives than the traditional model of exclusionary reasons. In this section, I will defend the presumptive reasons model by considering four objections to it. In addressing them, my aim is to further clarify the structure of the model and its implications for the problem of whether there can be a duty to obey the order to fight an unjust war waged in good faith by a legitimate state.

³⁶ Of course, there might be reasons to act as we are required by the directive, for example, when failing to do so will undermine respect for the law in those cases in which obedience is required. I bracket these considerations here.

A pair of objections targets the idea that by allowing the possibility to investigate the correctness of the decision made by the authority, and to include the outcome of this investigation in the deliberative process of the agent, the notion of presumptive reasons undermines the whole point of having the authority. Did we not see that authorities are able to perform their function only if they generate content-independent reasons for action, rather than reasons whose binding force depends on their being correct? And did we not see that these reasons are supposed to constrain the deliberation of those subject to the authority, so that they will not have to act on the balance of reasons? On the face of it, the model of presumptive reasons might seem at odds with both claims, insofar as it states that authoritative directives are not binding when mistaken and that we should balance the reasons we receive from the authority, instead of having those reasons constrain our deliberation.

In fact, the model is not at odds with either claim. Within the presumptive model, the reasons created by the authority are indeed content-independent, because they create a presumption that we will have to act as the authority requires, independently of whether the authority is correct in issuing a certain directive. That our all-things-considered duty is to disobey the authority when we are sufficiently confident that we are ordered to do something profoundly unjust does not depend on the fact that authorities create *content-dependent*, rather than *content-independent*, reasons for actions, but on the fact that they create *presumptive*, rather than *exclusionary* ones.

This brings us to the second objection, namely that the model of presumptive reasons seems to ultimately require that when we are ordered to ϕ , we balance the first-order reasons we have for and against ϕ -ing, whilst this is precisely what the presence of

authority is meant to rule out. The value of having practical authorities, as we have seen, is that they constrain our deliberation in a way that ultimately makes a difference as to how we ought to act. But if what we should do, at the end of the day, is simply balance the first-order reasons we have for and against ϕ -ing, it looks as if the authority doesn't make much of a difference after all.

This objection also misses the mark because presumptive reasons do indeed constrain the deliberation of those subject to the authority. When the authority orders us to ϕ , we acquire reasons to ϕ that are endowed with special normative force: we normally ought not to balance them with our first-order reasons. True, there is an epistemic threshold that, if met, allows the inclusion within our deliberative process of the first-order reasons to not- ϕ that the authority meant to exclude. But only occasionally will the threshold be met. When it is not met, agents should act as directed and ϕ "because the authority said so," instead of balancing the reasons to ϕ with competing reasons to not- ϕ .

It would be a mistake to think that because of this, the authority makes no significant practical difference, and that all we are left with is the need to deliberate about first-order reasons. There will be many cases in which the epistemic threshold will not be met (i.e. in which we will not be epistemically justified in believing that the authority has made a mistake), and in those cases our deliberation will be genuinely pre-empted. Those are cases in which our reasons to act as the authority requires are undefeated, and thus we are under a duty to obey, even if the authority has made a mistake and complying will lead us to perpetrate a serious injustice.³⁷ Once again, this is not because of what would

³⁷ That we are under a pro-tanto duty to obey the authority also makes a difference to our reasons for action when we do meet the epistemic threshold and, after deliberating about first order reasons, we establish that the reasons to obey are defeated. However, we need to be careful in spelling out what the difference is in

happen if we were to disobey the order (this would be falling back into a teleological understanding of the duty to obey), but because legitimate authorities have the power to create new reasons for action when they operate within the scope of their authority. These reasons need to be factored into the deliberation of those subject to the authority.

The third objection I will consider is that the model of presumptive reasons blurs the distinction between epistemic and practical reasons. Presumptive reasons might seem a strange hybrid between the two, which would undermine the credibility of the model. This worry can be addressed by clarifying that presumptive reasons are genuine practical reasons (i.e. reasons for action) and not epistemic ones (i.e. reasons to believe). My view is not that since legitimate states are more likely to individuate morally correct courses of actions, when they requires us to ϕ , we thereby acquire presumptive reasons to believe that ϕ is what we have a duty to do; reasons which can be then overridden if we have

this case. Once the reasons to ϕ created by the authority have been defeated, they are no longer operative. But while we no longer have reasons to ϕ created by the authority, we typically have other reasons for action that are generated by the fact that the authority ordered us to ϕ : for example, we might have reason to explain our behavior and answer for our failing to ϕ (to the authority or to someone else). Consider again the nurse case. If the nurse meets the epistemic threshold, the presumption in favour of obedience has been rebutted, and thus the nurse will have to deliberate about whether to administer the pill or not by appealing to first order reasons. Assuming that the reasons to administer the pill to the patient are defeated, the nurse has no reason to do so in virtue of the fact that the doctor ordered her. However, he will have reasons to answer to the doctor (or the hospital) for failing to administer the pill. Suppose that a second doctor (doctor*) from some other hospital, who has no legitimate authority over the nurse, orders him –perhaps mistakenly thinking that the nurse is in fact hers– to administer a lethal pill to a different patient (patient*). Suppose further that the nurse has no choice but to administer the pill to one of the two patients, in order to avoid some moral catastrophe. Once the reasons to obey the directives of his own doctor have been defeated, the nurse has no more reasons to give the pill to patient than to patient*. (She should probably flip a coin to decide who to administer the pill to.) However, while the nurse has reasons to answer to his doctor if he fails to administer the pill to the patient, he has no reasons to answer to doctor* for failing to administer the pill to patient*.

access to other epistemic reasons that rebut this presumption. States are practical authorities and, as we have seen, practical authorities cannot perform their coordinative functions by providing us with epistemic reasons, but only by creating reasons for action. However, certain reasons for action can be dependent on a given epistemic threshold being fulfilled.³⁸ There is nothing mysterious about that. Indeed, this is how presumptions normally operate within the law.

The presumption of innocence is an example. Saying that there is a presumption that the defendant is innocent until proved guilty is not saying that the jury and the judge should believe that she is innocent. Rather the presumption of innocence is practical in nature: it's a maxim that prescribes to treat the defendant in a certain way unless a given epistemic threshold is met. Roughly, the prescription is that the defendant should not be punished unless the epistemic threshold required to prove guilt is met (Ullman-Margalit 1983). Similarly, the presumptive reasons in my model are reasons that prescribe to treat the directives of legitimate states in a certain way (as reasons that we should act upon without balancing them with competing first-order reasons), unless a given epistemic threshold is met (the threshold that allows the inclusion within our deliberative process of the first-order reasons that the authority intended to exclude). Both in the case of the presumption of innocence and in the case of the presumptive model of authority, the agents receive genuine practical reasons: reasons to act in a certain way under certain conditions.

The final objection I will consider does not challenge the internal coherence of the model of presumptive reasons, but its plausibility when applied to the problem of war.

³⁸ The question of how the epistemic threshold should be set exactly is a difficult one. I intentionally bracket it for the purposes of this paper.

My argument is that when a legitimate state wages an unjust war, we are under a duty to comply with its order to fight *unless* the presumption in favour of obedience is rebutted. Moreover, we have a duty to ascertain whether the presumption is rebutted. However, I granted that there is no reason to believe that the presumption will be rebutted every time the state is making a mistake. For the presumption will be rebutted only when the epistemic threshold that allows appealing to first-order reasons is met; and whether this is the case, will depend in turn on the different epistemic positions of those subject to the authority.³⁹

To this view we might object as follows: even if I am right that states are necessary to avoid the injustices typical of the state of nature, and that this grounds a duty to obey them, we have seen that there are limits to what falls within the scope of their authority. Why not think that the right to wage war is one of those limits? Since states are prone to make mistakes in waging wars, and the consequences of these mistakes involve the perpetration of serious injustices, perhaps we should conclude that while we are under the authority of states in a number of other domains, we are not under their authority with respect to war-related matters. According to this view, states have the power to create pro-tanto obligations when it comes to traffic law or healthcare, but not when it comes to waging wars.⁴⁰

³⁹ Notice that this means that if Andy's epistemic position is superior to Ben's, it might well be that Ben is under a duty to obey, whereas Andy isn't. Andy and Ben will be subject to the same pro tanto duty to obey the law, but their all-things-considered duty to act as the law requires will be different.

⁴⁰ It's important not to conflate this objection with a different one, namely that while we are under the authority of states when they order us to wage just wars, we are not under their authority when they order us to wage *unjust* wars. This objection is a non-starter because, as we have seen, the duty to obey the law of legitimate states is not limited to just laws. States could not successfully perform their coordinative function if the reasons for action they purport to create were content-dependent.

In order to assess this objection, we need to compare how effective we would be in discharging our duties of justice in a world in which legitimate (hence reasonably just) states have this power and how effective we would be in doing so in a world in which they don't. This is because the justification of political authority, as we have seen, is instrumental in nature: we are subject to political authority because this enables us to discharge some of our most important duties of justice. If so, in determining which matters should fall within the scope of political authority, we'll have to look at the areas of conduct in relation to which we are unable, or significantly less likely to be able, to discharge these duties effectively if we are not subject to the authority of the state.

Now, assessing how effective we would be in discharging our duties of justice in a world in which war-making does not fall within the scope of political authority is not easy, if only because it is hard to imagine what the second world would look like. One thing seems clear enough though: a world in which states lack the right to wage wars would not be a world without wars. The worry is that it would be a world in which violent conflicts between groups would occur nonetheless, only they would not be led by political institutions that aim to fight only just wars and to do so by respecting the principles of *jus in bello*. If so, a world in which wars are fought by legitimate states that adhere to the principles of just war is a world in which we are better able to discharge our duties of justice than a world in which wars are fought by these other groups. And if this is true, the fact that states will occasionally fight unjust wars in good faith is not enough to deprive them of the right to wage war, which comes with the power to generate pro tanto reasons for their subjects to do so.

Grasping this point enables us to see why we should resist a worry that McMahan has raised against political arguments, namely that when the malfunctioning of political institutions leads to an unjust war, the costs of this malfunctioning should be borne by the members of those institutions, who benefited from their existence, not by non-members. As he puts it, “a person who occupies a role in an institution that is just overall may have a strong moral reason to continue to adhere to the requirements of her role even when she believes that the institution is functioning unjustly, provided that the victims are members of the group the institution serves. But if the victims aren’t members of the group by and for whom the institution has been constructed, as is true when a normally just military fights an unjust war, the reason a participant has to fulfill the requirements of her role must generally yield to the demands of justice” (McMahan 2006, 387).

The problem with this objection is that it fails to recognize that when it comes to war-making, it is in everybody's interest that individuals are under the authority of legitimate states acting in good faith. For when this is the case, all citizens of all states are constrained by their own state's good-faith decision as to whether to wage war and how to fight. It is misleading to suggest that while the Danes owe a duty of obedience to their state, this duty can never justify imposing harm on the Swedes. For, assuming that Denmark is a legitimate state acting in good faith, it is in the interest of the Swedes that the Danes are constrained by their state’s decision as to when they can wage war against Sweden (and vice versa).

5) The duty to obey and the duty to fight

This paper has offered a “political argument” for the duty to fight unjust wars waged in good faith by legitimate states. I have suggested that legitimate states perform crucially important functions, which are necessary to avoid the dangers of the state of nature; but they can do so only if they have the moral power to impose pro-tanto moral duties on their subjects, a power that does not disappear when states make “honest mistakes.”

A pro-tanto duty is always defeasible, but it does create a presumption that our all-things-considered duty is to act as required. This is why when a legitimate state orders us to fight, we are in a very different position from the one described by revisionists such as McMahan. According to the latter, we should presume that our duty is not to fight, unless we are sufficiently confident that the war is just; whereas according to my view, when a legitimate state acting in good faith orders us to fight, our presumptive duty is to obey, unless we are sufficiently confident that the war is unjust. While we do have a duty to investigate this presumption, there is no guarantee that it will be rebutted every time the state is making a mistake. For the presumption will be rebutted only when the epistemic threshold that allows appealing to first-order reasons is met; and whether this is the case, will depend in turn on the different epistemic positions of those subject to the authority.

However, my view sides with revisionists in two respects. First, it acknowledges that some combatants will have an all-things-considered duty to disobey the order to fight. Generally, this will be true of whoever is epistemically justified in believing that the war is unjust and sufficiently confident about this belief. Those who meet this epistemic threshold are allowed to balance first-order reasons against fighting with the reasons in

favour of obedience,⁴¹ and in that case the former will normally defeat the latter.⁴² Second, like revisionists, I argue that we do have a duty to investigate whether the war we are asked to fight is unjust. Our duty is not only to disobey *if* we have sufficient reasons to believe that the war we are asked to fight is unjust, but also to do what we can to find out whether the war is unjust.⁴³

On the other hand, my view is close to the orthodox account in that it acknowledges that there will be at least some combatants who will have an all-things-considered duty to obey the order to fight an unjust war (provided that the war is being waged by a legitimate state acting in good faith). This will be true of whoever is not epistemically justified in concluding that the war is unjust after having fulfilled his duty to investigate the correctness of the decision to fight. Given their epistemic limits, some combatants will fail to meet the epistemic threshold required to allow the first-order reasons against fighting to be balanced against the reasons in favour of obedience. When this is the case,

⁴¹ How many combatants will meet the threshold will depend on: a) their personal expertise and factual knowledge; b) how obvious the injustice of the war is. Some wars are so obviously unjust that very few combatants will fail to meet the epistemic threshold, but as revisionists acknowledge, often the epistemic limitations afflicting combatants are so severe that they cannot be overcome by most (McMahan 2009, 60–65, 119–21).

⁴² Normally, but not always. For example, if failing to obey the order to fight would lead to disastrous consequences, the all-things-considered duty might be to obey (particularly when one's participation will not significantly contribute to the advancement of the unjust cause).

⁴³ I leave aside here complications related to the fact that segments of an unjust war can be just, and thus combatants lacking an overall just cause might have a duty to fight in them. These complications do not affect the thrust of my view, although they will call for more complex assessments of what our all-things-considered duty is. For example, after having established that my state is pursuing an unjust cause, and thus the presumption in favour of obeying the order to fight has been rebutted, I might realize that there are reasons to fight a segment of it.

the presumption in favour of obedience is not rebutted and thus the pro-tanto duty to obey the order to fight is undefeated, even if the war is unjust.

Here is where the question of the objective justification of the war and the question of how combatants are justified –indeed, morally required– to act come apart. Whether a particular war is justified depends on whether *jus ad bellum* principles are met. But, *contra* revisionism, it's not enough that a war is unjustified to conclude that combatants have decisive reasons not to take part in it.⁴⁴ When the conditions described above are met, citizens of a legitimate state might have an all-things-considered justification for taking part in the war, despite it being unjust. For although they are fighting on the unjust side, these citizens are nonetheless acting according to their undefeated moral reasons. They are morally innocent not simply in the sense that they are blameless,⁴⁵ but in the sense that they are justified in so fighting. They are justified because fighting is what they have moral reasons to do all-things-considered.

As others have noticed, the situation of these citizens is similar to the situation of a judge who convicts an innocent person in good faith once the trial has established beyond any reasonable doubt that she is guilty. When this is the case, the judge is not merely excused for convicting the defendant. She is justified, indeed morally required, to do so, given the special reasons for action that apply to her in virtue of the role she occupies.⁴⁶ Similar special reasons for action apply to citizens in virtue of the role they occupy.⁴⁷

⁴⁴ To be sure, revisionists also allow for the exceptions based on the caveat mentioned in footnote 42.

⁴⁵ Revisionists readily concede that combatants fighting on the unjust side might be excused when they are misinformed (McMahan 2009, 137–54).

⁴⁶ For a discussion of this case in relation to the issues addressed in this paper, see (Estlund 2007) For reasons of space, I cannot here compare my argument and Estlund's. One obvious difference should be noted though: whereas Estlund grounds the duty to obey the order to fight unjust wars in the value of

This is the most important difference between my view and revisionism. *Contra* revisionism, I've suggested that membership in a legitimate political community can provide us with reasons for action that justify, as opposed to merely excuse, taking part in an objectively unjust war. More importantly, I have done so without rejecting reductivism. For the reason why citizens of a legitimate state waging an unjust war in good faith have a pro-tanto duty to fight is not that war is a morally distinct domain, whose rules are irreducible to the rules of ordinary morality. Rather, my argument is based on what ordinary morality requires of us when we act as members of a political community. It is part of ordinary morality that special reasons for action are generated when we act as members of certain institutions. This explains why under certain conditions nurses are justified to act in ways which will turn out to harm the patient or why judges are justified to convict someone who is in fact innocent. It also explains why under certain conditions citizens are justified to obey the order to fight an unjust war.

Notice that this justification is not best understood in belief-relative or evidence-relative terms (Parfit 2011, 150–53). When the relevant conditions are in place, neither judges nor citizens act according to reasons that merely exist in virtue of what they believe to be the case or reasons that are simply determined by the evidence available to them. Rather, they act according to reasons that are generated by the fact that a certain

democratic procedures, I argue that membership in a legitimate state is sufficient to generate the duty (under the conditions specified above), whether or not the state in question is a democracy. This makes my view more in line with international law, since international law does not make the right of combatants to participate in hostilities conditional on their state being a democracy.

⁴⁷ Since these reasons are grounded in mere membership in the political community, they should not be confused with the reasons generated when combatants sign contracts to obey lawful orders (on which see Lazar 2015b).

procedure, which they are morally required to adopt, has been followed – a procedure that, when completed, generates fact-relative reasons for action.

For example, a judge is morally required to acquit a defendant if his guilt could not be proven beyond any reasonable doubt, even if the judge has good reasons to believe that the defendant is guilty based of evidence that had to be suppressed (say, because of how it was obtained by the police). The reasons the judge has to acquit the defendant are neither belief-relative nor evidence-relative. They are best described as fact-relative, once we make clear that the morally relevant fact they track is not that the defendant has not committed the crime in question, but rather that the deliberative procedure the judge is morally required to follow delivered a verdict of acquittal.⁴⁸ Similarly, the reasons citizens have to fight when ordered to do so by a legitimate state acting in good faith are fact-relative, once we make clear that the morally relevant fact they track is that the deliberative procedure they are morally required to follow *qua* citizens generated an all-things-considered duty to obey.

Of course, that they are justified in fighting a war that turns out to be unjust cannot change the fact that those fighting on the just side are not liable to be killed. Since the latter have done nothing to forfeit their right not to be killed, they retain that right, and are thus wronged by the unjust attack.⁴⁹ This is the main reason why they are permitted to defend themselves; but in addition to that, a second reason may be provided, once again, by the political argument. If those unjustly attacked are also citizens of a legitimate state

⁴⁸ The judge's reasons to acquit would be evidence-relative if she had good reasons to believe that the deliberative procedure required him to acquit, whereas in fact it required her to convict.

⁴⁹ There is nothing mysterious in the thought that it is sometimes permissible to harm non-labile parties. Many agree, for example, that this is permissible when harming a non-labile party as a side effect is necessary to prevent a much greater harm.

waging the defensive war in good faith, they are permitted to take part in the hostilities on the same grounds as their opponents. In that case, their right to fight against the unjust attack will be overdetermined.

This conclusion provides what seems to me an ideal reconciliation of orthodoxy and revisionism. It vindicates the doctrine of the moral equality, to the extent that it grants combatants on both sides a permission to fight (under the conditions specified above), while acknowledging at the same time that combatants fighting on the just side are wronged by those fighting on the unjust side (since the former have done nothing to lose their right not to be killed).⁵⁰ This may ground compensatory duties and duties to apologize, which we do not have towards combatants who are liable to be killed.

More generally, my view accounts for the two desiderata spelled out at the outset of this paper: it is sensitive to an important dimension of our practical life, namely the obligations that we have qua members of legitimate states, while acknowledging at the same time that the justice of the cause of our state also makes a difference as to whether we can permissibly fight. As such, it avoids the main problems afflicting both Walzer's account and revisionism. The view preserves the main insight of revisionism about the importance of *jus ad bellum* considerations for the existence of a permission to fight, while rescuing to some extent the moral equality of combatants.⁵¹

⁵⁰ [My view vindicates the doctrine of the moral equality of combatants, insofar as it gives some combatants fighting on the unjust side a permission to fight. However, it does not vindicate a stronger interpretation of the doctrine, according to which combatants are permitted to fight independently of whether their state is legitimate or minimally just \(McMahan 2006, 385\). This is because, as we have seen, states that are illegitimate or that fail to be minimally just, lack the power to create pro-tanto obligations for their citizens.](#)

⁵¹ This paper has been a long time in the making, with its first draft dating back to the Summer of 2010. The main idea has remained unchanged throughout the years, but the paper has greatly benefited from excellent comments I received at various stages from Christian Barry, Saba Bazargan, Jason Brennan, Allen Buchanan, Tom Christiano, Antony Duff, David Enoch, David Estlund, Ceecile Fabre, Helen Frowe,

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